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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF PETITIONER.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Question Presented	2
Statement of Case	2
Summary of Argument	5
Argument	7
I. Goods imported, while retaining their character as imports, may not be subjected to general property taxes by a State	7
II. Imported goods, while remaining the property of the importer, stored in his warehouse in the original package or form, do not lose their character as an import	8
III. Goods imported for manufacture do not lose their character as an import any sooner than goods imported for sale	13
IV. Imported goods do not lose their character as imports because stored by the importer awaiting use by him	14
V. Before being subjected to manufacture, imported goods stored by an importer-manufacturer in original packages or form do not lose their character as an import	16
VI. The Wisconsin Court's exception to the traditional, well defined rules is impractical, an unwarranted extension and infringes upon the power of the Federal Government	19
VII. Petitioner's imported goods on the date of assessment had not lost their character as imports	30
Conclusion	34

AUTHORITIES CITED.

Cases.

American Mfg. Co. v. City of St. Louis, 238 Mo. 267, 142 S. W. 297 15

American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538 11

Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678 ..... 7, 8, 9, 12, 13, 14, 17, 22, 30, 33

Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015 ... 8

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320 32

General Cigar Co., Inc. v. Peck, 159 Ohio St. 152, 111 N. E. 2d 265 (1953) 31

Grinnel Corporation v. Bowers, 167 Ohio St. 267, 147 N. E. 2d 657 (1958) 31

Gulf Fisheries Co. v. MacInerney, 276 U. S. 124, 48 S. Ct. 227, 72 L. Ed. 495 17

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252 ..... 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 24, 26, 27, 28, 33

License Cases, 5 How. 504, 12 L. Ed. 256 33

Low v. Austin, 13 Wall. 29, 20 L. Ed. 517 ..... 8, 9, 10

Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 31

Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 595, 67 L. Ed. 1095 11

Southern Pacific Co. v. City of Calexico, 288 Fed. 634 (D. C. Cal.) 10, 12, 31

E. J. Stanton and Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P. 2d 804 ..... 32, 33

Waring v. The Mayor, 8 Wall. 110, 19 L. Ed. 342 . . . 12, 13
Washington Chocolate Co. v. King County, 21 Wash. 2d 630, 152 P. 2d 981 . . . . . 14, 15, 20

Constitutional Provision.

United States Constitution, Article I, Section 10, Clause 2 . . . . . 2, 4, 7

Texts, Treatises.

Accountants' Hand Book, Rufus Wixon 23

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OPINIONS OF COURTS BELOW.

The opinion of the trial court, the Circuit Court of Kewaunee County, Wisconsin, is not reported officially but is set forth at R. 9-29.

The majority and minority opinions of the Supreme Court of Wisconsin (R. 34, 46) are reported in 2 Wis. 2d 567, 87 N. W. 2d 481.

JURISDICTION.

1. The judgment to be reviewed is that of the Supreme Court of Wisconsin dated and entered January 7, 1958 (R. 34).

2. The statutory provision believed to sustain the jurisdiction of the Supreme Court is 28 U. S. C. § 1257 (c).

3. Petition for certiorari was filed April 1, 1958. Certiorari was granted May 19, 1958 (R. 49).

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is that part of Article I, Section 10, Clause 2 of the United States Constitution which reads as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and controul of the Congress."

QUESTION PRESENTED.

Is the levy of a general ad valorem tax by a state upon lumber and veneer imported by and stored in the taxpayer's storage yard and warehouse in the original form and packages in which they were imported and while remaining the property of the importer-taxpayer prohibited by Article I, Section 10, Clause 2 of the United States Constitution?

STATEMENT OF THE CASE.

This is a proceeding to review a judgment of the Wisconsin Supreme Court affirming a judgment which denied petitioner's claim for refund of a general ad valorem property tax paid under protest, assessed upon imported goods stored in its warehouse and storage yard by the petitioner-importer in the original packages or form in which imported.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin, under the name of the Algoma Plywood and Veneer Company division. On May 1, 1955, the assessment date of the general ad valorem tax, it used both foreign and domestic veneers and lumber in its manufacturing operations (R. 30). On May 1, 1955, petitioner had imported lumber and veneer stored in its warehouse and storage yard. It is the imposition of the tax on these imports which the petitioner has contested. Petitioner is not contesting the imposition of the tax on imported lumber and veneer which had been removed from petitioner's warehouse and storage yard to its factory.

Foreign veneers were imported by the petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of veneered products (Finding No. 4, R. 30). Veneers in original packages were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use.

Foreign lumber was imported by petitioner from Ontario, Canada. The lumber was imported in rough, unplaned form. It was shipped uncrated and unpackaged on railroad cars. The lumber, when received, was piled in the petitioner's storage yard. Both foreign and domestic lumber must be kiln dried by the petitioner before manufacture. The imported lumber air dried while in storage to varying degrees depending upon how long it remained in storage. Air drying reduced the time re-

quired for kiln drying. The trial court found that the dominant purpose of piling the lumber was to subject the lumber to air-drying before converting it into a manufactured product. It is good business practice and more economical to subject green lumber to air-drying before running it through the dry kilns. Most of the lumber in the storage yard on May 1st, 1955 was lumber received in green condition.

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity (R. 16).

On May 1, 1955, petitioner had on hand imported lumber and veneer valued at $288,593.00. The Circuit Court of Kewaunee County found that one-half of the imported lumber and veneer held in storage in the warehouse and storage yard, at a value of $144,292.26, was required to be on hand to meet petitioner's current operational needs as a manufacturer (Finding No. 9, R. 31).

Petitioner seeks review of that portion of the judgment of the Circuit Court for Kewaunee County, affirmed by the Wisconsin Supreme Court, which denied recovery of $2,677.46 in taxes assessed upon the imported lumber and veneer and which was paid by petitioner under protest.

Petitioner contended that the imported lumber and veneer were immune from general ad valorem taxation under Article I, Section 10, Clause 2 of the United States Constitution at every stage of the proceedings, originally in the protest of the assessment before the Board of Review of the City of Algoma (R. 5), then in the Circuit Court action for refund (R. 1), and thereafter by appeal to the Wisconsin Supreme Court (R. 34). The constitutional issue was discussed in the major portion of the Circuit Court's opinion (R. 9-29) and in the entire opinion of the Wisconsin Supreme Court (R. 34-47).

SUMMARY OF ARGUMENT.

1. While an import remains in its original package or form it retains its character as an import and a state tax levied on such property is prohibited by the United States Constitution. Petitioner's imported goods met the established tests for determining status as imports. In order to retain character as an import and hence immunity from state taxation, the importer must not incorporate or mix the import with the mass of property in the country. Although an import ceases its movement in interstate commerce, it does not lose its immunity from state taxation because it has ceased to move in such commerce.

2. Goods imported for the purpose of manufacture do not lose immunity any sooner than goods imported for the purpose of sale. Wisconsin can not tax a manufacturer's imports because of his intention to act upon the goods in the future. To do so would draw a distinction between goods imported for sale and goods imported for manufacture.

3. The state courts have followed the holdings of this court that a manufacturer's imports stored awaiting use are not being subjected to manufacture.

4. The Wisconsin court taxed the imports in question because they were required to be kept on hand for petitioner's current operational needs. This theory is impractical, was improperly applied by the Wisconsin Court and infringes upon the Federal Government's power to control the flow of imports.

5. The veneer imported by petitioner was stored in a warehouse in the original packages in which imported. Such veneer met all the established tests so as to retain its immunity from tax. Such veneer could not constitutionally be taxed on the grounds that it was required to be kept on hand for petitioner's manufacturing

operations. The trial court found that not only was the imported lumber taxable because required to be kept on hand for petitioner's current operational needs, but also because the lumber had entered the manufacturing process by virtue of being stacked in segregated piles. The stacking of the lumber in segregated piles was not acting upon the goods so as to incorporate them into the mass of taxable property in the country.

ARGUMENT.

I.

Goods Imported, While Retaining Their Character as Imports, May Not Be Subjected to General Property Taxes by a State.

The Supreme Court of Wisconsin affirmed the levy of an ad valorem property tax upon petitioner's imports because these imports were needed for petitioner's "current operational needs" as a manufacturer. Petitioner contends the levy of such tax was unconstitutional.

The basis for the constitutional immunity of imports is found in Article I, Section 10, Clause 2 of the United States Constitution which provides in part as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

At an early date this Court held that until an import loses its character as such, a state tax on the imported property is prohibited by the United States Constitution. *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1827).

Tariffs, excises and duties on imports have been an important source of Federal revenue. This source of revenue was reserved to the Federal Government in the Constitution. The Court in the *Brown* case, *supra*, pointed out that the importer purchases from the Federal Government a privilege of immunity from state taxation. Importers retain the privilege of immunity as long as the import retains its character as an import. The *Brown* case, also held that the immunity of imports from state taxation

rests upon the mere fact that the property is an import. The character of the property as an import is to be determined by its physical condition and not by its relationship to commercial or future use.

This fundamental principle, over the intervening years, has been reaffirmed by this court. *Low* v. *Austin*, 13 Wall. 29, 20 L. Ed. 517 (1872); *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878); *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252 (1945).

In this case, the parties agree that the lumber and veneer sought to be taxed by the respondent, City of Algoma, had been imported from without the United States of America by the petitioner as an importer. The veneer was stored in petitioner's warehouse in bundles or wood crates, the same packages in which it was imported. The lumber was received unpackaged and uncrated and was stacked in separate segregated piles in a storage yard, in the same form in which it was imported. The lumber and veneer so imported acquired immunity from taxation by the respondent City of Algoma as long as the property retained its character as an import.

II.

Imported Goods, While Remaining the Property of the Importer, Stored in His Warehouse in the Original Package or Form, Do Not Lose Their Character as an Import.

In *Brown* v. *Maryland, supra*, the court found that the importer had not acted in any way upon the imported goods so as to mix them up with the mass of property in the country by simply storing the imports in a warehouse in the original form of importation. The imports were stored awaiting sale. Notwithstanding this necessary

implication of future sale, the Court held that while imports were in that status or condition, with nothing more than intended sale of presumably varying degrees of imminence, a clear type of immunity from state tax existed. This Court there said:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Brown* v. *Maryland, supra,* at pp. 441-2.

Subsequent to *Brown* v. *Maryland, supra,* the "original package" doctrine, and the plain or clear case of immunity, was reaffirmed in the following language:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the state usually taxed for support of the State Government." *Low* v. *Austin, supra,* at p. 34.

It was considered possible in the *Brown* case that other circumstances might arise, as they later did, such as hypothecation of the goods or changes in condition by artificial means, which might change the character of the goods as imports. But the Court held that mere storage, evidently regardless of the imminence of sale, was the clear case prohibiting state taxation. If all that had occurred was receipt of such goods and its storage by the importer in his warehouse prior to his acting upon the goods in some way to incorporate them and mix them up with the mass of property in the country, they clearly had

not lost their character as an import. See also *Low* v. *Austin, supra; Southern Pacific Co.* v. *City of Calexico*, 288 Fed. 634, (D. C. Cal., 1923).

The trial court, and to a major degree the Wisconsin Supreme Court, in considering import immunity, relied upon principles adopted by this Court governing goods in interstate commerce. These rules are of no assistance in dealing with foreign imports since the legal inquiry is so essentially different.

In the case of imported goods, the problem is to ascertain when the goods have ceased to have the character of an import. This depends to a high degree upon the status or condition of the things imported and this court has never said or indicated that immunity was in any way determined by whether the import had ceased its movement in commerce or transportation, actually or constructively. In determining status or condition the fact that the goods while remaining the property of the importer are kept in storage in the original packages in which imported is very persuasive that the character of the goods as an import has not changed. Hence, the original package factor is far more determinative of the issue than it would be where the inquiry is as to matters not primarily affected by character or status, as is the case in state taxation of goods in interstate commerce.

In the cases involving burdens on interstate commerce, the principle of exemption from tax has been based upon the fact that the goods are in movement between one state and another. In such cases the essential element is not the character or condition of the goods but whether their movement has ceased and the goods have come to rest in the state claiming the right to burden them with taxation or otherwise. No burden on interstate commerce results when the tax is levied upon goods which have ceased to

move in commerce. Temporary stay-overs have been held not to evidence conclusively that the goods have come to rest. Some cases rely on the original packaging of goods to evidence the fact that the goods are still in transit. While recognized as a factor in determining motion or transit, the original package rule is clearly less persuasive in commerce clause cases since in many instances the goods have come to rest in original packages. There is very slight likelihood of further transportation out of the state in the original package where a manufacturer buys goods in another state or when a wholesaler does so and stores the goods. In this type of inquiry the fact that the goods remain in the original package is not too persuasive. This has been emphasized in such cases by the courts. *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538 (1904); *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 43 S. Ct. 595, 67 L. Ed. 1095 (1923).

When considering the immunity of an import, the character of the goods and not their motion or probability of further motion is the issue. Hence, imports which remain in the hands of the importer in his warehouse or storage yard in the original package or form in which imported are, upon the principles consistently recognized by this court, plainly exempt from state taxation since their character or status has not changed. Degrees of imminence of use do not aid in this determination, however helpful this factor may be in ascertaining likelihood of further movement in interstate commerce.

In *Hooven & Allison Co.* v. *Evatt, supra,* Chief Justice Stone noted that cases dealing with interstate commerce and state taxation are not applicable to import cases.

> "We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In

the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported." (324 U. S. at pages 665, 666.)

The original package or form doctrine is not always completely determinative of the issue as to change in the character of the goods as an import. Sale in the original package by the importer, thus putting the goods to the use for which imported, terminates their character as an import. *Waring* v. *The Mayor,* 8 Wall. 110, 19 L. Ed. 342 (1869). Change in title, even for credit purposes, is so acting upon the goods or putting them to the use for which they were imported as to change their character. *Southern Pacific Co.* v. *City of Calexico, supra.* Though these situations also come within the qualification to exemption specified by *Brown* v. *Maryland, supra,* that the property must remain the property of the importer, this is the kind of situation Chief Justice Marshall must have had in mind when he said that it might be premature to state any rule as being universal in its application and was one of the distinctions which was to be marked as the cases arose. This is not in any way in conflict with the basic principle. In the absence of any factors more than storage in original packages and without the importer in some way acting upon the goods, the imports do not lose their character as such.

Hence, Chief Justice Stone, in the *Hooven* case, observed that if the goods remain in the original package, stored in the importer's warehouse, while remaining his property, this Court has uniformly held taxation of the goods is prohibited by the constitutional provision.

III.

Goods Imported for Manufacture Do Not Lose Their Character as an Import Any Sooner Than Goods Imported for Sale.

It has been pointed out that "the object of importation is sale," and "importers for sale" have no purpose other than to sell the import. *Brown* v. *Maryland, supra.* The immunity from state taxation is not lost because the importer intends to sell. It is lost only when the sale is made. *Waring* v. *The Mayor, supra.*

No distinction can be made between an "import for sale" and an "import for manufacture."

> "We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports sooner or more readily than imports for sale." *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652 at page 667.

The Wisconsin Supreme Court in the case at bar disregarded this clear ruling of the United States Supreme Court. The Wisconsin Court begins its analysis of the constitutional immunity of imports by observing that most of the early cases involved imports for sale. It then recognizes *Hooven & Allison Co.* v. *Evatt, supra,* as the leading case involving imports for manufacture (R. 39). The court then emphasizes the narrow majority which prevailed, and what it describes as a cautious limiting of the ruling in the *Hooven* case by this Court (R. 40). To reach a result which causes a manufacturer's imports to lose their character as imports more readily than imports for sale, the Wisconsin Court erroneously bases its decision on the rules for determining when goods have ceased to be the subject of interstate commerce (R. 43).

The state courts have applied a contrary rule:

> "We find no reason or authority for distinguishing between imports intended for sale and those intended for use by the importer in some manufacturing process." *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 152 P. 2d 981 (1944).

The Wisconsin Court majority reached its conclusion by the application of rules this Court has clearly held inapplicable.

IV.

Imported Goods Do Not Lose Their Character as Imports Because Stored by the Importer Awaiting Use by Him.

The courts have held consistently from their earliest consideration of this problem that although the owner may use imports in the future, this does not alter their character as an import.

The argument that proposed sale changed the character of the goods as an import was advanced in *Brown* v. *Maryland, supra,* and rejected. The same argument with respect to intended use was also rejected in the *Hooven* case.

The Wisconsin courts also sustained the tax on the imported goods on the theory that because the importer assembled the goods for the purpose of changing their form, they had been put to use by him. This, the Wisconsin Court says, is not because of any acting upon the goods by the importer or any change in form effected, but because of its immediate availability for such use (R. 44). This is to deem accomplished that which in fact admittedly has not been accomplished. This specious reasoning was rejected in *Brown* v. *Maryland, supra,* and in *Hooven & Allison Co.* v. *Evatt, supra.* Chief Justice Stone, in the latter case, stated:

> "It is quite another matter to say, and Chief Justice

> Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443, 6 L. Ed. 678: 'The same observations [i. e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer.' (Italics added.)" 324 U. S. at page 665.

State courts have followed the rule that imports of raw material stored in original packages while awaiting use are immune from state taxation. In *Washington Chocolate Co.* v. *King County, supra,* the Supreme Court of the State of Washington held that the State was prohibited from levying an ad valorem property tax on imports held by a manufacturer and awaiting use. The manufacturer imported cocoa beans and stored the original packages in its warehouse where the beans remained until processed by the manufacturer into chocolate and cocoa. The Washington Court discussed numerous cases, including the 1943 decision by the Ohio Supreme Court in the *Hooven* case, and concluded the imports were immune from taxation while stored in the original packages awaiting use by the manufacturer.

> "Respondent is engaged in the manufacture of chocolate and cocoa from cocoa beans, and cannot be penalized because it imported a large quantity of the raw material which was the chief ingredient of its manufactured product." 152 P. 2d at page 992.

Certiorari was denied in the *Washington Chocolate* case, 324 U. S. 880, 65 S. Ct. 1022, 89 L. Ed. 1831 (1945).

The Missouri court in *American Mfg. Co.* v. *City of St. Louis,* 238 Mo. 267, 142 S. W. 297 (1911), held that raw material for bag manufacture imported by the manufacturer and stored in original packages was immune from state taxation. The court noted that to tax such raw materials

would discourage these imports to the same extent as a tax upon imports for sale, contrary to the spirit of the constitutional immunity.

The question of taxability of goods stored awaiting use, if it had been considered open prior to the decision of *Hooven & Allison Co.* v. *Evatt, supra,* was clearly disposed of in that case. The Ohio Supreme Court held that imported fibers though stored in their original package in the importer's warehouse, ceased to be an import and lost immunity from tax because they were stored awaiting use by the importer in its manufacturing operations. An ad valorem property tax was assessed upon these goods by the State of Ohio in the same manner in which the lumber and veneer were here assessed. The Court held that though the imports were stored pending use in the taxpayer's manufacturing operation, they had not lost their character as imports.

V.

Before Being Subjected to Manufacture, Imported Goods Stored by an Importer-Manufacturer in Original Packages or Form Do Not Lose Their Character as an Import.

Although the matter apparently had not been urged upon the Ohio courts, the argument was made in this Court in the *Hooven* case that part of the goods so stored awaiting use might be deemed as within the current operational requirements of the importer-manufacturer and could be carved out for assessment; thus some of the goods "awaiting use by the importer" could be subjected to tax. This is the essence of the holdings of the Wisconsin courts here for review. This is an attempt to do under one label the precise act repeatedly condemned under another.

The Wisconsin Court observed that the leading case which considered imports for manufacture is this court's decision

in *Hooven & Allison Co.* v. *Evatt, supra.* This decision discussed imports of this character more extensively than other cases that dealt with the same problem.

In *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124, 48 S. Ct. 227, 72 L. Ed. 495 (1928), Justice Brandeis, for this Court, stated that the fish involved, if they once were imports, had been so acted upon by the importer that at the time of taxation they were no longer in their original package or form, and hence were taxable.

For the first time in *Hooven & Allison Co.* v. *Evatt, supra,* this Court met the contention there suggested that property which had not in any way been acted upon or subjected to manufacture could be taxed because of the purpose of the importer and the imminence of its intended use. Although the specific question had not been presented in *Brown* v. *Maryland,* Chief Justice Marshall observed that *until used,* imports retained their character as imports and were immune from state taxation even though the import was intended to be used by the importer. This immunity was recognized by the court in *Hooven & Allison Co.* v. *Evatt, supra,* notwithstanding the intended or imminent use of the import. This Court condemned the suggestion that goods may be taxed merely because they are awaiting use. The decisions of this Court which have permitted imported goods to be taxed when subjected to manufacture all involved actual physical acting upon the goods. Taxes on imports which were awaiting use or intended to be used, but remained in their original packages, have been uniformly condemned. This Court in the *Hooven* case reaffirmed its position in this respect in the following language:

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable

> to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown* v. *Maryland*, in which he appeared as counsel for the State, declared, as we now affirm: 'Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.' License Cases, 5 How. 504, 575, 12 L. Ed. 256." 324 U. S. at page 666.

In condemning the "awaiting use" theory this Court rejected this attempt to reach such goods when it said that imports were not subjected to manufacture when they were placed in the importer's warehouse in their original packages. In the *Hooven* case, *supra*, the Court said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages." 324 U. S. at page 667.

Accordingly, as observed by the dissenting opinion of the Wisconsin Court, the law is well settled that goods stored awaiting use remain imports and are not subject to tax regardless of the importer's intention to use them in future manufacture and regardless of the imminence of their use. The Wisconsin Court minority correctly concluded that the form of the rejection of the argument of the tax collector in the *Hooven* case did not change the established law and that the decision in fact clearly refused to change it.

VI.

The Wisconsin Court's Exception to the Traditional, Well Defined Rules Is Impractical, an Unwarranted Extension and Infringes Upon the Power of the Federal Government.

(a) Loss of character of goods as imports, based on the "current operational needs" theory of the Wisconsin Court is impractical and unreasonable.

The possibility of a "current operational needs" theory, suggested by Chief Justice Stone's dictum in the *Hooven* case, purports to be the basis for the Wisconsin Court's decision. The Wisconsin Court draws upon one sentence in the *Hooven* case to support it in this result. However, the *Hooven* opinion cannot be read as supporting the Wisconsin Court's version of any "current operational needs" theory. The most that can be said is that the majority opinion contains *dictum* concerning a possible reservation of a question.

Chief Justice Stone in the *Hooven* case confirmed the purpose of the court over the years to find a point, "capable of practical determination, when it can fairly be said that" imports have become a part of the mass of taxable property within a state. The Wisconsin concept of "current operational needs" cannot be said to mark such a point since it calls for a completely subjective determination and virtually defies definition. This concept would mean many different things depending upon the type of industry involved, the state of our economy or season.

Chief Justice Stone emphasized both the fairness and ease of administration of the established rule, calling attention to the very slight amount of litigation which the principles adopted and adhered to by this court for so many years had produced. In *Washington Chocolate Co.*

v. *King County, supra,* the court emphasized this factor in the following language:

> "The doctrine that while remaining in the original package in which it was imported the merchandise is exempt from taxation has the advantage of certainty, and pursuant to the opinions of the Supreme Court, may be easily applied in any case of admitted or proven facts." 152 P. 2d at page 992.

It is clear that the Wisconsin "current operational needs" theory would be simply a partial recognition of the "awaiting use" theory, carved out from the latter, and used in an attempt to reach immune imports in order to subject them to tax. The test is unsound since it depends entirely upon the importer's intention. The Wisconsin Court rejected these arguments on the ground that principles equally difficult of application, such as determinations of value, have been adopted by the courts. It would seem that little argument is required to demonstrate that, however difficult determinations of value may be in some situations, it is capable of far greater accuracy than a determination of any single industry's "current operational needs" at any one point of time.

Value has been defined and is from time to time, or in comparable situations, confirmed by established facts. "Current operational needs", as used by the Wisconsin Court, is not defined and because of the difficulty in application to various businesses, probably cannot be. Some indication of the difficulty this presents may be found in the trial court's opinion in this case where it speculates on methods for finding a rule for ascertaining what is meant by "current operational needs" (R. 14, 15). In order to give it the meaning necessary to terminate the immunity of the goods at an earlier point in this case, shipments in the course of transportation at the time had to be and were ignored. This was not recognizing the

facts of economic or industrial life which the Wisconsin Court said must be respected in applying the Constitutional provision here involved.

In addition to the variations of "current operational needs" from industry to industry, and from time to time, most industries must vary material usage to meet the varieties of orders received. Accordingly, most industries find substantial variations in the consumption of their different kinds of materials. Hence, it is extremely difficult to establish patterns which would form any basis for determining how much of varying types of material, foreign or domestic, would be required. An industry may run for some period of time on one kind of material and suddenly switch to another for an extended period of time. Thus, with respect to material on hand, it would be often difficult to ascertain how long a supply for manufacturing needs will last. Adoption of the Wisconsin Court's "current operational needs" theory, assuming the term could be defined, would be to go to the extreme opposite of that "point * * * capable of practical determination" which the courts have recognized as requisite to a sound rule. Industry as well as the administrators of the taxing authorities require a method of certainty for the purpose of ascertaining tax liability in order to avoid gross inequities in the burden of those taxes. Tax assessment should be as objective as it can be made and not as subjective as a test of this character would require.

If the "current operational needs" theory of the Wisconsin Court were to be adopted, either tremendous uncertainty and grave difficulty in administration and, therefore, inequity would result, or virtually all imported goods "awaiting use" would be taxed. Importers, in these days of high costs of maintaining inventories, will keep on hand no more than their best estimate of their "current operational needs" dictate. To do so would place them at a severe dis-

advantage with their competitors because of the costs of carrying such an inventory. This would be true of importers for sale as well as importers for manufacture. If, as has been said, the immunities provided are practical concepts, then the inevitable result of the practicable application of this vague and uncertain term would inevitably lead to the taxation of all such goods on hand.

The Wisconsin "current operational needs" theory compels the application of rules applicable to the commerce clause of the constitution. It must ignore the nature of the import clause which by necessary implication contemplates some affirmative act of the importer to effect a change in the character of the goods as an import. The arguments in support of loss of immunity of imports are, under this approach, ultimately resolved by emphasizing that movement in commerce has ceased. This concept is not relevant to inquiry regarding the immunity of imports from state taxes and cannot reasonably be used for the purpose of ascertaining a change in character of an import. Hence, use of the Wisconsin "current operational needs" concept to sustain a tax requires the adoption of a vague and uncertain phrase incapable of being defined and implemented by tests applicable to other parts of the Constitution dealing with unrelated matters. On no accepted rules of construction or logic can the result reached by the Wisconsin Court be defended.

(b) Accepted accounting principles provide a practical and reasonable rule of interpretation.

This court stated in *Hooven* that it has been recognized since *Brown* v. *Maryland, supra*, that "the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter" (324 U. S. at 668). It is difficult to imagine a solution to the problem of ascertaining when status changes which is more practical or reasonable than a rule

based upon the accepted principles of the science and practice of accounting. This represents the generally accepted meaning of terms in the everyday working world of commerce and industry.

The accounting profession recognizes a distinction between materials being used in the process of manufacture and materials not being so used. The following language from the "Accountants' Handbook", edited by Rufus Wixon, professor and chairman of the accounting department of the University of Pennsylvania's Wharton School of Finance and Commerce points out the line of distinction:

> "The principal types of assets included under inventories are:
>
> 1. Merchandise.
> 2. Materials.
> 3. Supplies.
> 4. Work in process.
> 5. Finished goods.
>
> "* * * *Materials* consist of goods purchased by a manufacturer or converter with the intention of physically incorporating them into the final product of the manufacturing or conversion operation. Such goods may be raw materials, or they may be partially fabricated commodities secured from other concerns * * *
>
> "* * *
>
> "*Work in process* includes all materials to which manufacturing services have been applied and upon which further production operations are necessary before the product is ready for sale * * *." (Fourth Edition, page 12.1.)

Imported materials should not be deemed to be in the process of being used for the purpose for which they were imported until such time as the commercial and industrial world would generally understand and determine, in accordance with accepted principles of accounting and without regard to tax considerations, that the materials in

question should be transferred from an importer-manufacturer's "materials" account to his "work in process" account. This rule is a reasonable and practical solution to the problem. Inasmuch as a transfer from "materials" account to "work in process" account will generally, if not invariably, occur simultaneously with a change in the location of the materials and/or the initiation of a change in the form or composition of the materials, the transition of the status of imported materials from that of an "import" to that of a "non-import" will be marked by objective circumstances and clearly ascertainable events, the occurrence or nonoccurrence of which cannot ordinarily be the subject of dispute. A situation in which the courts would be required year by year to resolve disputes between tax assessors and importer-manufacturers as to what portion of the inventories of imported materials held for use by importer-manufacturers are necessary in order to meet their "current operational needs" thus will be avoided, and the distinction will conform to the general understanding in industry and commerce as to when an import loses its character as such. The rule fits all of the principles of interpretation of this constitutional provision consistently recognized by this Court since the first case decided in 1827.

(c) The Wisconsin Court's interpretation of "current operational needs" is an unwarranted extension of the possible exception commented upon in the *Hooven* case *dictum*.

In holding that one-half of the imported materials were required to meet the current operational needs of the Petitioner, the Wisconsin courts relied on Mr. Chief Justice Stone's possible reservation of the question "whether, for purposes of the constitutional immunity, the presence of some fibers *in the factory* was so essential to current manufacturing requirements that they could be said to have

entered the process of manufacture", 324 U. S. at 667. Careful analysis of the entire paragraph in which the above-quoted language appears will reveal that the arbitrary allocation of one-half of the imported materials to the so-called "current operational needs" of the Petitioner does not render those materials subject to state taxation within the meaning of Chief Justice Stone's dictum. The Chief Justice said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question."

The Chief Justice begins his discussion by stating unequivocally that "It cannot be said the fibers were subjected to manufacture when they were placed *in petitioner's warehouse* in their original packages." He then finds it "unnecessary to decide whether * * * the presence of some fibers *in the factory*" would render those fibers subject to state taxation presumably because, as was the fact, the record did not indicate whether any of the fibers were

placed in the factory in their original packages "to meet such immediate current [manufacturing] needs." The Chief Justice concludes by saying that the record afforded "no basis for saying that *any part* of petitioner's fibers, stored *in its warehouse* were required to meet such immediate current needs."

It is apparent from the Chief Justice's careful use of the words "warehouse" and "factory" that in his view, and presumably in the unanimous[1] view of this Court, "the current operational needs" of a manufacturing business are the "*immediate* current needs" of the business. All that the Chief Justice intimated was that if a taxpayer maintains its daily operational requirements of materials next to its machines in original packages, this Court might have to consider further the question whether such materials retained their status as imports.

But it is apparent from the Record that the imported materials which Wisconsin has attempted to tax were in storage in a warehouse or storage yard and had not in any sense been appropriated to use by the Petitioner. Petitioner has not contested taxation of the imported materials withdrawn from storage, but only the tax on that portion of the imported materials which remained in the warehouse or storage yard.

Turning to the Record on Appeal in the *Hooven* case, it becomes clear that the Wisconsin courts' interpretation of the "current operational needs" theory of Chief Justice Stone is unwarranted and erroneous.

The record in the *Hooven* case made it quite clear that the fibers held in storage by the petitioner constituted "a

1. As will be shown later, the dissenting opinion did not accept the contention of the State of Ohio that the Hooven Company's minimum working inventory was being "used" in that Company's current manufacturing activities.

minimum working inventory".[2] The record in the *Hooven* case also makes it clear that as a bale of fiber was removed from the warehouse, it was immediately charged as being "in process".[3] What did not appear in the record was whether the goods removed from the warehouse were sufficient for the Hooven Company's "*immediate* current needs". It is to this point that Chief Justice Stone addressed his remarks.

Despite Chief Justice Stone's careful limitation of a possible "current operational needs" theory to materials held for immediate use in the factory, or, perhaps, to materials in a warehouse which, considering the nature of the manufacturing operation, would ordinarily have been required in the factory, the Wisconsin courts have transformed and expanded that theory to make it include all imported materials held in a reasonable working inventory, though in storage in a warehouse or yard and without demonstrated need for immediate current operational requirements.

The error of the Wisconsin courts becomes even more

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2. "Q. How long are they kept in the warehouse usually before they are used? Is there any definite time in which they are kept there?

"[Fol. 52] A. No; it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course." (R. 42.)

3. "Q. When you take the fiber out of the warehouse do you make a bookkeeping entry to show that it has been removed from the warehouse and charged to some other part of the operation?

"[P. 43] A. Certainly, it is removed from the raw material account and charged into processing in the mill; each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; it may not be used for a couple of days; but as soon as it leaves the warehouse it is charged in process; the usual procedure in any class of goods, I suppose." (R. 42-43.)

evident when the arguments made by the State of Ohio in the *Hooven* case are considered. In its briefs in this Court Ohio argued that a minimum working inventory of imported materials held in a warehouse by the manufacturer-importer had lost their status as imports because maintenance of a minimum working inventory constituted actual *use* of such materials. Thus, in its summary of argument, Ohio stated:

> "2. The petitioner is a manufacturer and, as such, used quantities of imported fibers. It took from three to six months after an order was placed to get deliveries of such fibers. In order to keep its plant in constant operation, it was necessary to keep a 'backlog' or supply of fibers in its warehouses. The petitioner always operated its business 'with a minimum working inventory' and never bought fibers for the purpose of sale. Under these circumstances, it is contended that the petitioner has used the fibers just as truly as if it had broken the original packages and started them through its mills. By so using the fibers, even if it be the importer, the petitioner has exhausted the tax free privilege of the imports and they are thereafter to be considered as domestic property subject to state taxation."

And, later on in its brief, Ohio stated, after setting forth the portions of the Record on Appeal quoted above:

> "In other words, when the imported goods reached the plant [that is, when they were placed in the warehouse] they were immediately used, in that they were essential to the continuous daily operation of petitioner's plant."

A majority of this Court in the *Hooven* case flatly rejected that argument by noting that goods "held for use" do not lose their character as imports any more than do goods imported for sale while held for sale.

It is significant that the dissenting opinion in the *Hooven*

case did not embrace the "current operational needs" theory. The dissenting justices would have held that all goods "awaiting use" in manufacturing do not have the same status as imports as do goods held for sale. Why did not the dissenters seize upon the "current operational needs" theory? The answer seems clear—the dissenters understood that Chief Justice Stone's suggested "current operational needs" theory, to the extent it might ever be recognized, would not subject to state taxation that portion of the imported goods, in original packages or form, which remained *in storage in the taxpayer's warehouse.*

(d) Loss of character of goods as imports, based on "current operational needs," infringes upon the power of the Federal Government.

The Constitution granted the taxation of imports to the Federal Government. Tariffs and duties have been a source of revenue for the Federal Government, though no longer its most important source. Of even greater significance, however, is the control exercised by our Federal Government over the size and amount of duties on imports. Decreasing and increasing duties and tariffs provides an important instrumentality for establishing and maintaining relationships with foreign countries. Since an ad valorem tax adds to the cost of an import to the same degree as the size of a duty, permitting an importer to be so taxed by the states would shift control over the flow of imports from our Federal Government to the states.

In these critical days in world affairs, the increasing importance of the United States as a stable influence requires that every instrumentality at the command of the Federal Government be preserved to enable it to meet that responsibility. An effective means of maintaining and improving relationships with other countries is to encourage foreign commerce. The flow of imports must be controlled by the Federal Government in order to achieve this

goal. Surrender of this control over imports to the states at this time, or perhaps at any future time in our history, would be gravely inappropriate. No strained construction of the import clause of the Constitution, in conflict with a well established and clear meaning, is now justified.

VII.

Petitioner's Imported Goods on the Date of Assessment Had Not Lost Their Character as Imports.

The veneers stored in the original package met all established requisite tests (R. 9) to their continued immunity on the date of assessment.

With respect to the lumber, the trial court found that it had been subjected to manufacture on the date of assessment. This was based upon a finding that the dominant purpose of the piling was air drying which reduced the period of time required in the kilns, though all lumber had to be kiln dried for use in the manufacturing process (R. 17).

One of the purposes of stacking the lumber in a manner which would permit air drying is to avoid rotting which naturally results when air is not permitted to gain access to the individual sticks. On the basis of the rules announced in *Brown* v. *Maryland, supra,* and thereafter continuously followed and adhered to, the question becomes one of whether the importer had so acted upon the goods as to mix them up with the mass of property in this country. The stacking did prevent rotting. Whatever separation of moisture from the wood occurred was entirely accidental and was inevitable from a mere lapse of time.

Though it would seem clear that stacking for storage and a lapse of time could not be considered action upon the goods within the meaning of the authorities, it was

certainly less acting upon the goods so as to mix them up with the mass of property in the country than to open original packages, compress their contents and repackage them for shipment. In *Southern Pacific Co.* v. *City of Calexico, supra,* such acts were deemed not sufficient acting upon the goods to mix them up with the mass of property in the country. The acts of the importer here seem clearly to be less than the heat treatment of crude oil so as to change its viscosity and enable its transportation by pipeline into storage tanks. Such change in the viscosity of oil was deemed not so acting upon the goods as to mix it up with the mass of property in the country in *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

The air drying of the lumber was entirely a natural occurrence. No artificial means were employed. The sticks of lumber were not acted upon by men, machines or any kind of equipment after unloading and stacking in the storage yard. Natural occurrences during a period of storage do not constitute subjection to a manufacturing process. In *Grinnel Corp.* v. *Bowers,* 167 Ohio St. 267, 147 N. E. 2d 657 (1958), the natural maturation and mellowing of whiskey in charred oak barrels was held not to change the status of the whiskey from "stored goods" to a "manufacturing process." Many stored goods require that some means be taken to prevent deterioration. In *General Cigar Co., Inc.* v. *Peck,* 159 Ohio St. 152, 111 N. E. 2d 265 (1953) the owners of stored tobacco, for its preservation, heated and aerated the leaves. The tax authority contended that this constituted the first step in the manufacturing process of the tobacco. However, the court held that this position was untenable; that precautions required to preserve a stored product do not constitute processing or a step in the manufacture of a product.

The California Supreme Court in *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. 2d 181, 177 P. 2d 804 (1947) on other grounds sustained a tax on imported lumber, but emphasized that it was not seeking to tax lumber stacked in piles to prevent rotting even though the lumber had been sorted according to size, grade and specie.

It cannot fairly be said that because of the natural drying of the lumber it had thus been subjected to the manufacturing process. The generally accepted meaning of the term "manufacturing process" is that some acting upon the material to transform it to a different state or thing is required. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320 (1945).

Regardless of the dominant purpose of the importer and the natural drying which took place, there was not present here such acting upon the goods as to mix it up with the mass of property in this country which would result in loss of character as an import. The drying of the lumber was inevitable. Air drying began from the time the logs were cut into lumber in Canada and went on while the lumber was stored there for shipment, loaded aboard cars and during the period of its transportation to Algoma, Wisconsin.

To hold that this natural occurrence constituted subjection to manufacture would be to require, as a condition of continued immunity and preservation of character as an import, the introduction of artificial means to prevent drying, thus calling for far more substantial acting upon the goods by the importer. Hence, loss of some moisture through wholly natural causes, without any action of the importer or material change in form of the goods, cannot fairly be considered as a change in character of the lumber as an import.

Both the trial court and the Wisconsin Supreme Court were disturbed about the absence of packaging of the lumber and referred to the penumbral case of *E. J. Stanton & Sons* v. *Los Angeles County, supra.* The California Court and the Wisconsin Court in their examination and consideration of the original package doctrine, overlooked the rule ever since *Brown* v. *Maryland, supra,* that immunity extends both to packaged and unpackaged goods. It was for this reason that the courts have always referred to original package *or form* and have looked to the form or change therein as one of the important factors in determining whether the goods had lost their character as an import. The absence of packaging has not been considered by this court to be significant. *Hooven & Allison Co.* v. *Evatt, supra; License Cases,* 5 How. 504, 12 L. Ed. 256 (1847).

The Wisconsin Court seems to be deeply concerned about discrimination in favor of imported goods if the rule announced by the majority in *Hooven & Allison Co.* v. *Evatt, supra,* is adhered to. Chief Justice Stone in the latter case disposed of that argument by calling attention to the fact that such discrimination as there may be is implicit in the constitutional provision and that it is not up to the courts to alter it.

Conclusion.

Petitioner, United States Plywood Corporation, respectfully submits that the judgment of the Wisconsin Supreme Court should be reversed with directions to enter judgment for the Petitioner against the Respondent on Petitioner's claim for refund of $2,677.46 with interest from January 4, 1956.

Respectfully submitted,

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